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No. 07-1122

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the Arizona Court of Appeals held that a police officer violated the Fourth Amendment by conducting a protective frisk of a person who was probably a member of a violent gang and who presented a danger to the officer and her fellow officers in the course of their duties during a lawful traffic stop. In so holding, the court failed to strike the appropriate balance and reached a decision contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On April 19, 2002, Oro Valley Police Officer Maria Trevizo was patrolling a "gang related" neighborhood, known as Sugar Hill, near Tucson, Arizona, while on assignment for the state gang task force. *State* v. *Johnson*, 217 Ariz. 58, ¶2, 170 P. 3d 667 (App. 2007). Two other officers were on patrol with Officer Trevizo. *Ibid*. One of the officers " 'r[a]n the license plate of a vehicle' and found it had a 'mandatory insurance suspension.' " *Id*., ¶3 (footnote omitted). The three officers stopped the vehicle.

Johnson was a passenger sitting in the rear of the vehicle. *Id*., ¶4. At the time of the stop, Officer Trevizo had "no 'reason to believe that [Johnson] was engaged in criminal activity . . . .' " *Ibid*. However, Johnson's conduct in the car "was unusual," "and it made [Officer Trevizo] nervous." *Ibid*.

While another officer spoke to the driver and had the driver exit the vehicle to obtain information from the driver's license, registration, and insurance, Officer Trevizo spoke with Johnson in the back seat. *Id*., ¶¶4, 7. During the stop, Officer Trevizo examined Johnson for one of seven criteria that indicate criminal street gang membership. See *id*., ¶5, and n. 2. One indicator of gang membership is the color the individual is

wearing. At the time of the stop, Johnson was dressed "entirely in blue, and had a blue bandanna." *Id.*,¶ 5, and n. 2. Officer Trevizo had been trained to recognize bandannas as a sign of " 'allegiance or . . . affiliation with a certain gang.' " *Ibid.* She knew the color blue is associated with the Crips gang. *Id.*, ¶ 2.

Officer Trevizo also observed that Johnson had " 'a scanner in his jacket pocket.' " *Id.*, ¶ 6. This "concerned" Officer Trevizo because "people normally do not have [a scanner] 'unless they're going to be involved in some kind of criminal activity or going to try to evade police by listening to the scanner.' " *Ibid.*

During the stop, Officer Trevizo learned Johnson was from an area where the " 'predominant gang [is] called the Trekkle Park Crips,' " and that Johnson had been in prison for burglary but had been out for "about one year." *Id.*, ¶ 7. Suspecting Johnson to have knowledge about gang activity in the area, Officer Trevizo asked Johnson to step out of the vehicle. *Id.*, ¶ 8. "She sought to isolate [Johnson] from the other occupants of the vehicle in the hope that he would contribute more information." *Ibid.*

When Johnson exited, Officer "Trevizo 'asked [Johnson] to turn around' and 'patted him down for officer safety because [she] had a lot of information that . . . [led her] to believe [Johnson] might have a weapon on him.' " *Id.*, ¶ 9. At trial, Officer Trevizo testified "it was 'the totality of what happened that evening that led [her] to pat him down.' " *Ibid.* During the pat down, Officer Trevizo felt the butt of a gun near Johnson's waist. *Ibid.* When Johnson began to struggle, Officer Trevizo placed handcuffs on him. *Ibid.*

Johnson was charged and convicted by a jury of possession of a weapon by a prohibited possessor and possession of marijuana. *Id.*, ¶ 10. The trial court

denied Johnson's motion to suppress the evidence seized during the pat-down search conducted by Officer Trevizo for her safety. *Ibid*. On appeal, Johnson alleged the trial court had erroneously denied his motion to suppress. *Id*., ¶11. Division Two of the Court of Appeals of Arizona agreed and held that an officer could not conduct a *Terry* frisk without establishing reasonable cause to believe " 'criminal activity may be afoot' " when an officer initiates an investigative encounter with a passenger that was "wholly unconnected to the original purposes of the routine traffic stop of the driver." *Id*., ¶29, quoting *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968). The Arizona Supreme Court denied discretionary review. Pet. for Cert. 1.

This Court granted certiorari on June 23, 2008.

SUMMARY OF ARGUMENT

The legality of a "frisk" does not necessarily depend on a preceding or continuing seizure. The general principle, as stated in Justice Harlan's concurrence in *Terry* v. *Ohio*, is "when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection." In the typical *Terry*-stop situation, the lawful confrontation prong requires a valid detention of the person frisked, but there are other situations where this is not a requirement. When an officer serves a warrant or detains another person, performance of that duty may require confrontation of others who may be present. That unavoidable confrontation plus a reasonable basis to suspect the person may be armed and dangerous is sufficient to authorize a frisk. The Court of Appeals' discussion of when the seizure of Johnson ended is therefore irrelevant.

The Fourth Amendment is ultimately based on the reasonableness of the officer's action. A reasonably prudent officer's decision to frisk a person present while the officer performs his or her duty does not depend on whether that person is free to leave. If the person is present and possibly dangerous, a brief frisk for weapons is the prudent and reasonable action.

The Arizona Court of Appeals' decision in this case places an excessive limitation on the ability of officers to exercise command of a situation in which they have lawfully stopped a vehicle. In doing so, the court has aggravated the danger faced by officers in a dangerous situation that has resulted in the deaths of many peace officers. This decision fails to strike the appropriate balance between an important public safety interest and a relatively minor intrusion upon privacy.

ARGUMENT

I. The legality of a "frisk" does not necessarily depend on a preceding or continuing seizure.

The Court of Appeals in this case believed that under *Terry* v. *Ohio*, 392 U. S. 1 (1968), the legality of the frisk in this case depended on whether Johnson was legally seized at the time of the frisk. *State* v. *Johnson*, 217 Ariz. 58, ¶¶ 15-18, 170 P. 3d 667 (App. 2007). This assumption is fundamentally mistaken, and it produced an irrelevant discussion of whether Officer Trevizo's questioning of Johnson was consensual and at what point the seizure of Johnson ended. See *id.*, ¶¶ 16-27. None of this matters, because the officer's authority to frisk in this situation does not depend upon the passenger being seized.

The Court of Appeals relied on its precedent of *In re Ilono H.*, 210 Ariz. 473, ¶ 14, 113 P. 3d 696 (App. 2005),

which in turn relied on Justice Harlan's concurring opinion in *Terry*. See *Johnson*, 217 Ariz., ¶ 15. In this opinion, Justice Harlan stated the general principle as "when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection." *Terry*, 392 U. S., at 32 (Harlan, J., concurring).

As applied to the particular situation before the Court in *Terry*, lawful confrontation in the line of duty meant "the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop." *Ibid*. (italics in original). That is, when the situation is simply an officer approaching a person he believes is suspicious, as in *Terry* and *Ilono*, a valid, forcible stop is one of the prerequisites to a lawful frisk. This is not, however, a universal principle for all frisk situations.

Professor LaFave states the general rule.

> "In determining whether a police officer had a basis for initiating a frisk, there are two matters to be considered: whether the officer had a sufficient degree of suspicion that the party frisked was armed and dangerous; and whether the officer was rightfully in the presence of the party frisked so as to be endangered if that person was armed." 4 W. LaFave, Search and Seizure § 9.6(a), p. 615 (4th ed. 2004).

After quoting the same portion of Justice Harlan's *Terry* opinion, LaFave continues,

> "Harlan's basic point is eminently sound. Although, as is noted below, there will sometimes be some *other proper reason* (e.g., to execute a search warrant, to arrest another person, or to conduct an

> investigatory stop of some other person) for being in the presence of the person who is believed to present the risk, the fact remains that a frisk for self-protection cannot be undertaken when the officer has unnecessarily put himself in a position of danger by not avoiding the individual in question." *Id*., at 616 (emphasis added; footnotes omitted); see also *id*., at 636 ("frisk-of-companion rule" is "[m]ost likely not" limited to a situation where the "companion himself could have been legitimately stopped for investigation").

The latter "just avoid him" rationale does not apply in the former "other proper reason" situations, where officers are placed in proximity to the possibly dangerous person in the performance of their duty.

In the search warrant situation, which LaFave says is "essentially the same analysis," LaFave § 9.6(a), at 638, *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), illustrates the requirement for a frisk of a person whom a police officer lawfully confronts in the line of duty, when he has no basis for suspecting that person is presently engaged in any criminal activity. Ybarra happened to be in a bar where the police were serving a search warrant. The police patted down all of the customers present. See *id*., at 88. "The initial frisk of Ybarra" was not valid because it "was simply not supported by a reasonable belief that he was armed and presently dangerous," *id*., at 92-93, not because he had not been seized at that point. See *Los Angeles County* v. *Rettele*, 550 U. S. __, 127 S. Ct. 1989, 1992 (2007) ("officers may take reasonable action . . . to ensure their own safety"). The same principle applies to a person who is present at a traffic stop but who is not the target of the stop.

Where an officer simply walks up to a person on the street and asks questions, the officer could have avoided the confrontation, and *Terry* stop reasonable suspicion

is a prerequisite. Where a bystander or a passenger who is not seized chooses to remain at the scene of a stop even though free to leave, it is that person and not the officer who has chosen confrontation. In this situation, reason to suspect the person may be armed and dangerous should be the only requirement for a frisk.

The fact that Officer Trevizo asked Johnson questions he did not need to answer, for reasons unrelated to the traffic stop, is simply irrelevant to the Fourth Amendment question in this case. Asking questions is neither a search nor a seizure. See *Muehler* v. *Mena*, 544 U. S. 93, 100-101 (2005). When questioning neither causes nor prolongs a detention, it does not create a Fourth Amendment violation that would not otherwise exist. See *id*., at 101-102.

The Fourth Amendment question is simply whether the frisk was reasonable under the circumstances. The relevant circumstances are that Officer Trevizo was assisting a lawful stop of a vehicle in which Johnson was a passenger. Johnson was on the scene, in the officers' presence. Perhaps he could have left at some point, but he did not. If he was armed, he presented a danger to the officers.

II. Fourth Amendment inquiry begins with a determination of what is reasonable.

Reasonableness is the touchstone of the Fourth Amendment. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108-109 (1977). "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions . . . ." ' " *Dela-*

ware v. *Prouse*, 440 U. S. 648, 653-654 (1979), quoting *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978) (footnote omitted).

It is through the prism of reasonableness that this Court must determine the practical standards that govern when an officer may frisk a passenger of a lawfully stopped vehicle. The same reasonableness that allows citizens to discern what constitutes fair or excessive government interference will simultaneously guide officers as they perform public safekeeping duties. This balance between reasonableness and public safekeeping is jeopardized when a court interprets the Fourth Amendment to limit the officer's authority to conduct a protective frisk because the court has determined that the encounter has crossed a nebulous line between a seizure and a nonseizure. See *State* v. *Johnson*, 217 Ariz. 58, ¶¶ 27-29, 170 P. 3d 667 (App. 2007) (finding search invalid because encounter had become consensual). The protective frisk is legitimate so long as the officer acted as a "reasonably prudent man" in deciding whether the brief intrusion was justified. *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968).

Determining what action is prudent requires a realistic awareness of the risk. Individuals detained in routine traffic stops occasionally turn out to be armed criminals who present a grave danger to the officer. See U. S. Dept. of Justice, Federal Bureau of Investigation, Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers, p. 40 (Sept. 1992). In these situations, officers must be allowed a reasonable means of protection. Law enforcement officers need to be safe, and the government's interest in public safety justifies the brief intrusion of a protective frisk. See *Prouse*, 440 U. S., at 654 (reasoning "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's

Fourth Amendment interests against its promotion of legitimate governmental interests").

The Arizona Court of Appeals misapplied the principle of reasonableness when it adopted the rule that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger . . . ." *Johnson*, 217 Ariz., ¶ 29. By making the legality of the risk depend on the irrelevant event of asking the passenger questions, the court detached the analysis from the reason that *Terry* found that frisks are reasonable in some situations. Instead, the lower court should have decided the issue it refused to reach, "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the routine traffic stop, may routinely pat down passengers . . . whom they *reasonably* suspect might be dangerous." *Id*., ¶ 28 (emphasis added).

III. The lower court's decision is an unreasonable and excessive limitation of the officer's "command" of a lawful detention.

If the lower court had addressed the correct issue, it would have had to acknowledge that the risk to officers during a lawful detention "is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan* v. *Summers*, 452 U. S. 692, 702-703 (1981); see also *Los Angeles County* v. *Rettele*, 550 U. S. __, 127 S. Ct. 1989, 1993 (2007); *Muehler* v. *Mena*, 544 U. S. 93, 99 (2005); *Maryland* v. *Wilson*, 519 U. S. 408, 414 (1997). A protective frisk insures that an officer "lawfully confronting a possibly hostile person in the line of duty" can maintain control of the situation

and act for his own protection. *Terry* v. *Ohio*, 392 U. S. 1, 32 (1968) (Harlan, J., concurring).

Officers routinely place themselves in danger in the name of duty, and we must also allow reasonable procedures that enable officers to protect themselves. This Court has found it reasonable for an officer to order a passenger out of a car, as a precautionary measure, *Wilson*, 519 U. S., at 414-415, and has also found it reasonable for officers to detain the occupants of a home during the execution of a valid search warrant. *Rettele*, 127 S. Ct., at 1993-1994. Officer actions in each of these cases did not violate the Fourth Amendment, because the nature of these encounters placed the officers in potentially dangerous situations. Reasonable suspicion that the detainees had committed a criminal act was unnecessary, as the situation required the officers to lawfully confront potentially dangerous individuals, and the officers "act[ed] in a reasonable manner to protect themselves from harm." *Id*., 127 S. Ct., at 1993-1994.

A *Terry* frisk for weapons is a minimal intrusion given that the passenger has already been detained, at least initially, and the risk to the officer is great. See *Brendlin* v. *California*, 551 U. S. __, 127 S. Ct. 2400, 2407 (2007). In fact, this Court has upheld more invasive procedures which protect officers executing valid search warrants. *Mena*, 544 U. S., at 99. In *Mena*, the plaintiff had been placed in handcuffs and detained in a converted garage, while officers searched her home for a gang member who was believed to be armed and dangerous. *Id*., at 95-96. Mena claimed that she had been detained " 'for an unreasonable time and in an unreasonable manner' in violation of the Fourth Amendment." *Id*., at 96. In finding no Fourth Amendment violation, this Court reasoned that "[t]he imposition of correctly applied handcuffs on Mena, who was

already being lawfully detained during a search of the house," was intrusive, but reasonable, because "[i]n such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants." *Id*., at 99-100.

The use of a *Terry* frisk on a passenger in a lawfully stopped vehicle is decidedly less intrusive than the force utilized in *Mena*. The officer's decision to frisk should therefore be subject to less scrutiny, not more. If an officer has lawfully confronted a possibly hostile individual during the course of his duty, the officer's duty requires him to exercise command over that situation. When circumstances make it reasonable for the officer to perform a protective frisk, his conduct does not violate the Fourth Amendment.

By allowing for a "point" where an officer's command over a passenger ceases, so that the officer is no longer justified in conducting a protective frisk even though the passenger remains at the scene, the Arizona court has excessively limited an officer's ability to control a situation by disarming those who are potentially dangerous. *Johnson*, 217 Ariz., ¶ 18 (treating the termination of seizure as the termination of authority to frisk). The decision fails to consider that oftentimes a dangerous passenger will not walk away from the encounter and therefore will remain a danger. In these cases, it is reasonable for the officer to frisk the individual. It does not matter whether a frisk was the initial reason for the traffic stop, see *Illinois* v. *Caballes*, 543 U. S. 405, 408 (2005), nor should it matter that the officer did not immediately order the passenger out of the car. Cf. *Johnson*, 217 Ariz., ¶ 21. A Fourth Amendment standard that causes an officer to wonder whether he has reached the "point" where his ability to check a passenger for weapons has ceased is unreasonable and

will jeopardize the government's interests in public safety and effective law enforcement.

IV. Officers are required to seize potentially dangerous persons every day.

A. Seizure of Passengers.

A Fourth Amendment seizure occurs every time police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Michigan* v. *Chesternut*, 486 U. S. 567, 569 (1988). When vehicles are involved, investigatory seizures occur when the officer has reasonable suspicion to stop the car. See, *e.g.*, *Illinois* v. *Caballes*, 543 U. S. 405, 406 (2005); *Wyoming* v. *Houghton*, 526 U. S. 295, 297 (1999). While the driver may be the initial focus of the officer's inquiry, all of the occupants of the vehicle will be subject to "some scrutiny." *Brendlin* v. *California*, 551 U. S. __, 127 S. Ct. 2400, 2407 (2007). In *Brendlin*, this Court stated:

> "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Ibid*.

It is not unreasonable for scrutiny of the vehicle's occupants to result in a protective search. Of course, "[a] seizure that is justified solely by the interest [of a traffic stop] can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U. S., at 407. But where the duration of the detention does not exceed its purpose, and any subsequent investigation does not by itself violate the Fourth Amendment, legitimate interests in privacy are not violated. See *id*., at 408. An officer's decision to frisk does not "compromise" a legitimate privacy interest when his duty has placed him within striking distance of a potentially hostile person, so long as his search was reasonable.

LaFave has suggested that the degree of suspicion necessitating a constitutional frisk is lower than

> "the requisite degree of suspicion justifying [a] stop. Thus, assuming grounds for a stop, a certain suspicion that the person is armed might well warrant a search even though that suspicion, standing alone, would not justify a stopping to investigate the possibility that the individual is committing the offense of carrying a concealed weapon." 4 W. LaFave, Search and Seizure § 9.6(a), pp. 622-623, n. 33 (4th ed. 2004).

Furthermore, to protect his own safety, there are times when, either because of the driver's or a passenger's suspicious actions, an officer may feel the need to perform a pat down of all the passengers in a vehicle. See LaFave § 9.6(a), at 636 (stating the "frisk-of-companion rule" should not be viewed as only permitting a frisk when the companion himself could have been stopped because it "would not reach all cases in which the officers would be under reasonable apprehension"). If "the State's proffered justification—the safety of the officer—is both legitimate and weighty," *Mimms*,

434 U. S., at 110, the authority which permits the officer to detain should also permit a protective search based on reasonable suspicion that the passenger is armed and dangerous. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Mimms*, 434 U. S., at 111 (footnote omitted).

In *Mimms*, this Court "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id*., at 110. This Court acknowledged that, given the state's need to allow precautionary practices "to afford a degree of protection to the officer . . . ," *ibid*., ordering the driver out of the car was a *de minimus* intrusion. *Id.,* at 111. *Maryland* v. *Wilson*, 519 U. S. 408, 410 (1997), extended the rule of *Mimms* to apply to passengers of a lawfully stopped vehicle. Again, this Court balanced society's interest in public safety against an interest in personal liberty. *Id*., at 413. The principle of reasonableness required the Court, "as a practical matter," to acknowledge that because "the passengers are already stopped by virtue of the [lawful] stop of the vehicle," the additional intrusion of being required to exit the vehicle was minimal. *Id*., at 413-414. The reasonableness of the officer's conduct did not depend on whether the passenger was suspected of criminal activity, but was based in a government interest for officer safety. It was because the presence of more than one occupant in the vehicle *increased the risk of harm to the officer*, and the passenger was already restricted by the legal stop, that the officer's action did not violate the Fourth Amendment. *Id*., at 413-414.

It is not against common sense to extend the same interest in officer safety, which permits an officer to order a passenger out of a vehicle, to acknowledge the necessity of a pat down when a potentially armed

passenger steps out of the vehicle. An officer's common-sense experience compels him to pat down a possibly dangerous passenger who is present at the scene of a traffic stop. Even the dissenters of *Wilson* acknowledged that "if a police officer conducting a traffic stop has an articulable suspicion of possible danger, the officer may order passengers to exit the vehicle as a defensive tactic without running afoul of the Fourth Amendment." *Wilson*, 519 U. S., at 415 (Stevens, J., dissenting); cf. *id*., at 416 (expressing concern only over stops where there is not a "scintilla of evidence of any potential risk to the police officer").

B. Hazards of Roadside Encounters.

The danger of traffic stops is shown in the statistics. From 1996 to 2005, 102 of 575 felonious law enforcement fatalities occurred during traffic stops. U. S. Dept. of Justice, Federal Bureau of Investigation, Law Enforcement Officers Killed and Assaulted, 2005 (Nov. 2006) (Table 26), online at http://www.fbi.gov/ucr/killed/2005/table26.htm. Homicides during traffic stops are a major cause of death, of the same magnitude as more obviously dangerous situations, such as arrests and ambushes. See *ibid*.

For example, in one case two Long Beach police officers were wounded during their initial approach of a stopped SUV. See Winton & Blankstein, Two Long Beach officers shot; The driver of an SUV who was pulled over for a traffic stop opens fire and flees, L. A. Times, Dec. 23, 2006, p. B1. "[T]he driver jumped out and fired at least a half a dozen shots." *Ibid*. One officer received "four shots to the neck." *Ibid*. His partner "was shot in the face." *Ibid*. Or consider the killing of Twinsburg, Ohio, Police Officer Joshua Miktarian. Miktarian was killed when he stopped a suspect for driving under the influence and playing loud

music. Kleinerman & Johnston, Twinsburg mourns officer killed in line of duty, The Plain Dealer, July 14, 2008, p. A1. "Two minutes into the traffic stop, Miktarian radioed for help, police said. Almost simultaneously, a 9-1-1 caller reported loud shouting and 'pop' sounds." *Ibid*.

Certainly, the high number of officers killed in traffic stops is due in large part to the fact that there are so many traffic stops. Even so, officers do die while conducting traffic stops, and they may be more at risk when there is another person in the car. In an FBI study of 51 officer homicides, "[e]leven of these killers were not the target of the officer's initial approach." U. S. Dept. of Justice, Federal Bureau of Investigation, Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers, p. 37 (Sept. 1992). In one case,

> "the victim officer executed a traffic stop in which there were three individuals in the vehicle. The victim wanted to cite the driver for a traffic violation, disregarding the two passengers. One of the passengers exited the vehicle, approached the patrol car in which the officer was seated, and shot and killed the officer." *Ibid*.

If this officer had exercised authority to pat down passengers of the vehicle that might be armed and dangerous, the passenger would not have had the opportunity to take his shot. The Fourth Amendment must not require officers to defer to the privacy interests of those they suspect are presently dangerous.

Justice Harlan's concurrence in *Terry*, properly understood, provides the key to the decision in the present case. In his concurrence, Justice Harlan states that when the question is "whether evidence produced by a frisk is admissible, the problem is to determine

what makes a frisk *reasonable*." *Terry* v. *Ohio*, 392 U. S. 1, 31 (1968) (Harlan, J., concurring) (emphasis added). The reasonableness of any frisk is justified when the officer "lawfully confronting a possibly hostile person in the line of duty" finds it necessary "to frisk for his own protection." *Id*., at 32. A different standard would not only jeopardize officers as they conduct already dangerous jobs, but it would be contrary to the general principle of reasonableness, which has long guided Fourth Amendment inquiry. The decision in this case must support the right of an officer, "springing only from the necessity of the situation," *ibid*., to frisk a passenger in a stopped vehicle whenever there is a reasonable basis to suspect he may be armed and dangerous.

In the present case, Johnson's gang clothing, possession of a scanner, and criminal history were more than sufficient to raise the requisite suspicion.

CONCLUSION

The decision of the Arizona Court of Appeals should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation